IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DOCKET NO.

79-424

In the Matter of the Application

of

THE BOARD OF REGENTS of the University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent,

ON CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

ROBERT D. STONE
Deputy Commissioner
for Legal Affairs
Attorney for Petitioners
Office and Post Office
State Education Building
Albany, New York 12234
(518) 474-6150

Jean M. Coon,
Deputy Counsel
Donald O. Meserve,
Associate Attorney,
Of Counsel

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Citations to Opinions Below

The majority and dissenting opinions of the Circuit Court of Appeals for the Second Circuit are reported in 603 F.2d 255 et seq. and are printed in the Appendix at pages A-55-65. The decision of the United States District Court for the Northern District of New York was not officially reported, and appears in the Appendix at pages A-41-54.

Prior state court litigation between these parties, relevant to this case, culminated in a unanimous decision of the New York State Court of Appeals, reported

in 38 NY 2d 724, 343 N.E. 2d 755, and printed in the Appendix at pages A-9-11. The Court of Appeals there affirmed a unanimous decision of the Appellate Division of the New York State Supreme Court, reported in 43 AD 2d 643, and printed in the Appendix at pages A-5-8 which decision reversed a judgment of the New York State Supreme Court, rendered at Special Term without any written or recorded opinion.

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on June 19, 1979. It affirmed so much of a judgment of the United States District Court for the Northern District of New York entered August 5, 1978, as awarded declaratory judgment for respondent under 42 U.S.C. §1983 determining that her civil rights had been violated by failure to offer a hearing, and as dismissed the defenses of res judicata and of the statute of limitations. No cross appeal had been filed by respondent from other parts of the judgment of the District Court.

A petition for certiorari was filed September 14, 1979 pursuant to 28 U.S.C. §1254, and was granted by order of this Court, dated November 5, 1979.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in this case are set forth in the appendix hereto and are the following:

United States Constitution Amendment 14, §1 (pages A-1).

28 U.S.C. §1738 (page A-2).

42 U.S.C. §1983 (page A-3).

Former New York Education Law provisions providing Special Examinations for "Grandfather" Chiropractors, §6556 (page A-4).

New York Education Law §6551, subdivision 1 defining chiropractic (page A-7).

New York Education Law §6506 authorizing the Board of Regents to waive specific requirements in any profession or to enclose licenses of other jurisdictions (page A-8).

Former New York Statutory Provisions replaced effective September 1, 1971 by §6506, set forth above §211 (page A-9).

Section 6553 (page A-11).

Questions Presented

1. On the facts in this case was it an error to hold that due process requires the offer of a hearing?

2. Did the Court below fail to give proper faith and credit to the interpretation of state statutes by the New York courts?

3. Did the Court below err in refusing to dismiss the complaint on the defenses of res judicata and failure to comply with the statute of limitations?

Statement of Case

The initial chiropractic licensing statute was enacted in New York as Chapter 781 of the Laws of 1963, effective July 1, 1963. The statute, as amended, set forth general licensing requirements including an examination. It also included an alternative method of qualification for current practitioners, who were given six chances to pass a special examination designed to

test their understanding of fundamental concepts and also to take into account their experience in actual practice (former New York Education Law section 6556, (set forth in the Appendix hereto at p. a-4). Respondent took the special examination six times and failed it each time. She then took the regular licensing examination and failed it. A record of her marks on these seven examinations appears at page A-56. She remains eligible to take and pass the regular licensing examination, but has not attempted it since 1972.

After failing to meet the requirements of the chiropractic licensing statute, respondent applied for a waiver of the examination requirement under a separate provision of the Education Law, applicable to all professions, authorizing the waiver of specific licensing requirements "provided the board of regents shall be satisfied that the requirements . . . have been substantially met" (Education Law section 6506 subdivision 5) (Appendix hereto p.-8). That application was based upon respondent's assertions that she had "almost" passed the examination, that she was licensed in two other states (Maine and New Hampshire), and that she had passed an examination given by the National Board of Chiropractic Examiners, at that time a private organization without official status in New York State (R-Exhibit A to Appendix to Ct. of App. pp. 24-32). The application for a waiver of the licensing examination was denied and respondent was so notified by a letter dated November 22, 1971 (id p. 33). The denial was based upon the conclusions that almost passing an examination is not the substantial equivalent of passing it, that the licensure requirements in Maine and New Hampshire were not substantially equivalent to those in New York, and that the National Board Examination was not substantially equivalent to the examination required by the New York statutes. These reasons were fully set forth in writing in an affidavit of the Executive Secretary of the State Board for Chiropractic, dated February 3, 1972, and in later papers in the state court proceedings, (id. p. 46-7).

Respondent instituted state court proceedings to compel the waiver of the examination requirement and the issuance of a license. The Court of original jurisdiction, New York Supreme Court, County of Albany, granted judgment for respondent from the bench without any written opinion. The Appellate Division of the Supreme Court, Third Judicial Department unanimously reversed, on an opinion reported in 43 AD 2d 643 (and set forth at A-5-8). The New York State Court of Appeals unanimously affirmed the dismissal of respondent's petition, on an opinion published in 38 N.Y. 2d 724 (A-9-11), and entered judgment on November 21, 1975.

In June 1976, over four and one-half years after the determination, and seven months after the final judgment of the New York State Court of Appeals, respondent commenced this action in the United States District Court for the Northern District of New York, contending that the refusal of petitioners to issue a license to practice chiropractic in the State of New York was a violation of her civil rights. The relief requested was an injunction permitting her to practice chiropractic in New York State. Petitioners answered and moved for summary judgment dismissing the complaint.

Respondent alleged Federal jurisdiction under the 14th and 5th Amendments, 28 U.S.C. sections 1331, 1343, 2201, and 2202 and 42 U.S.C. section 1983. The decisions of the Courts below apparently sustained jurisdiction under the 14th Amendment, 28 U.S.C. section 1331 and 42 U.S.C. section 1983.

The District Court awarded judgment partially in favor of the respondent, declaring that the failure of petitioners to offer her a hearing on her application for a waiver of the examination requirement constituted a denial of due process. The Court refused to order the issuance of a license or to grant any injunctive relief. The Court also rejected the defense that the action was time-barred and the defense of res judicata (A-41-54).

Petitioners appealed from so much of the judgment as dismissed the defenses of the statute of limitations and of res judicata and declared that petitioners had violated respondent's constitutional rights.

No cross appeal was filed by respondent.

The Court of Appeals for the Second Circuit affirmed, with Circuit Judge LUMBARD dissenting (A-55-65).

This Court granted petitioners' petition for certiorari.

Summary of Argument

An applicant for a license to practice chiropractic who fails seven licensing examinations is not entitled, as a matter of constitutional due process, to a hearing on an application to waive the examination requirement. Especially, where there is no issue of fact, and where it would be an abuse of the licensing agency's discretion, under state law, to grant the application and waive the examination.

Any previous "right" or reasonable expectation of a right to continue practice ended when respondent failed to pass the examination required by the specific licensing statutes. Her subsequent application for a waiver of the examination requirement was made under a general statute authorizing discretionary waiver of specific requirements which had been substantially met. Determination of that application on the undisputed documentary evidence and written arguments submitted by her counsel constituted all the process due her under the Constitution.

The application for waiver of the examination requirement was based on a New York statute, Education Law section 6506. The petitioners, the New York agency responsible for administering that statute, and the New York courts, have consistently interpreted that statute as not intended to excuse failures on licensing examinations. Petitioners therefore argue that the

Courts below erroneously ignored the construction placed on this statute by the New York courts.

The issue of respondent's right to practice chiropractic in New York and to licensure was the subject of prior litigation by her against petitioners in the New York courts. It culminated in unanimous judgments against her in the two New York appellate courts. This action should have been barred under the principle of res judicata. It should also have been barred because of respondent's failure to commence it within the three year statute of limitations.

Petitioners further contend that the Courts below erred in not giving full faith and credit to the provisions of the New York statutes and judicial interpretation of those statutes, and in postulating and applying a federal exception to res judicata on the facts of this case, and in tolling the statute of limitations.

ARGUMENT

POINT I

THE DECLARATORY JUDGMENT THAT DUE PROCESS REQUIRED A HEARING ON THE FACTS OF THIS CASE WAS IN ERROR.

Any consideration of what process is "due" should begin with an analysis of what is being decided. The Court below perceived this to be a case in which petitioners had taken action which deprived respondent of property or liberty. It misconstrued both the nature of the administrative determination by petitioners and the meaning and relevance of the State statutes under which respondent's application was made. Point II will discuss the misinterpretation of the State statutes which we contend occurred. This point will deal with the declaration that "due process", as applied to the factual situation presented in this case, required that respondent be offered a hearing, a declaration which we submit was also erroneous.

When minimum standards for licensure were imposed by the licensing act of 1963, the constitutionality of the new requirements and of their application to present practitioners, including respondent, was litigated, and the licensing act was sustained (Wasmuth v. Allen, 14 NY 2d 391, app. dism. 379 U.S. 11 [1964, per curium]). Although the State had never affirmatively conferred a right to practice upon respondent, we freely concede that the continuation of the practice she had begun in the absence of any State action or limitation was something valuable to her, and could not be taken away in an arbitrary or capricious manner. She was entitled to some form of procedural due process. This was fully provided by the impartial administration of the series of special examinations. All three of the judges of the Circuit Court agreed that requiring respondent to pass a competency examination was not a violation of her civil rights.

The majority of the Court below erred, however, in holding that due process required a hearing on her later application for a waiver of the examination requirement which she had proven herself unable to fulfill. Even assuming that the waiver statute could be applied to excuse failures on licensing examinations*, the determination on the undisputed facts of this case, that such an application required a hearing, would still be in error.

First, we contend that respondent's "right" to continue to practice chiropractic was terminated by her failure to pass the examination required by the chiropractic licensing statute, and had terminated before she made her later application for a waiver of the examination.

*As stated, that assumption is contended to be erroneous as set forth in Point II, supra.

Respondent's initial application for licensure was submitted February 27, 1964. She was entitled to admission to a special limited series of examinations for persons practicing prior to the enactment of the licensing statute. She completed that series of six examinations given between 1964 and 1971, and failed to pass (A-56).

At the conclusion of the grading of the last of the series of special examinations she was notified that she had failed to qualify for licensure and would have to discontinue the practice of chiropractic. That notice was given by a letter dated September 15, 1971 (R-Exhibit A to app. to Cir. Ct., p. 34). No timely action to review that determination was commenced in state or in federal court. Her case was closed. She could still qualify by passing the regular licensing examination, and she made one unsuccessful attempt to do so. She is still free to take that exam, but has chosen not to try again.

Instead she filed a new application under a different statute, discussed in detail in Point II. We submit that this new application did not revive any "right" to continue to practice, or relieve respondent of the consequences of her failure to meet the statutory licensing requirements.

The majority of the Court below cited Board of Curators, University of Missouri v. Horowitz (435 U.S. 78 [1978]) in support of its decision. However, we submit that the principles stated by this Court in that case, and in Leis v. Flynt, ____ U.S. ____, 58 L. Ed. 2d 717, (1979) support the position of petitioners and of the dissenting Judge in the Circuit Court.

As this Court noted in Leis v. Flynt, supra, at 58 L. Ed. page 721:

> "the Constitution does not create property interests. Rather it extends various procedural safe-

> guards to certain interests 'that stem from an independent source such as state law.' "

This Court there found that the laws of Ohio authorizing Ohio courts, in their discretion, to permit out of state lawyers to appear pro hac vice did not confer a property right, and that no hearing was required on such an application. Particularly appropriate to the instant case is the language (58 L. Ed. 2d at p. 722):

> "A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding. [citation omitted] * * * Even if, as the Court of Appeals believed, respondents has 'reasonable expectations of professional service,' [citation omitted] they have not shown the requisite mutual understanding that they would be permitted to represent their clients in any particular case in the Ohio courts."

Here, as in Leis v. Flynt, supra an application was made addressed to the discretion of the State agency. Here, as there, the State had never previously conferred the "right" in question by statute, legal rule, or mutually explicit understanding. Prior to the enactment of the chiropractic licensing statute in 1963 New York generally ignored the practice of chiropractic. The State did not authorize, regulate, or prohibit such practice. Respondent's prior practice as a chiropractor did not give her any expectation that she would be able to continue to practice without having to meet any reasonable requirements for licensure which might thereafter be imposed by the State for the protection of the health and welfare of its citizens (Wasmuth v. Allen, supra).

The most she had was an expectation that any licensure requirements would be reasonable and that she would have a fair chance to meet them. She had that chance. She certainly never had any reason to believe that if she could not meet the requirements New York would waive them just for her, so that she could continue to practice. There was no "statute, legal rule or mutually explicit understanding" that she would be exempted from any licensing requirement, and certainly not excused from her inability to pass the licensing examination. Under this situation the rule stated in Leis v. Flynt, supra should be applied and this Court should hold that, after her failure on the examinations, respondent had no property right which could require a hearing on her application for waiver of the examination requirement.

In Board of Curators, University of Missouri v. Horowitz, supra the state action was based on the failure of an applicant to meet an academic requirement. This Court found that due process did not require a hearing to review an academic determination. The use of professional examinations to determine eligibility for the practice of a profession is also an academic determination, and it is not the adversary type of dispute in which the Court had found hearings to be required by due process. The distinction between academic and disciplinary actions, recognized in Board of Curators, University of Missouri v. Horowitz, supra should be applied in this case also.

Second, even assuming that respondent still had a protected property right after her failure to meet the statutory requirements for a license, the nature of her application for waiver of the examination requirement was not such process as to require a hearing in order to constitute "due process".

Respondent based her request for waiver of the licensing examination on her narrow margin of failure on the last of the six special examinations, her years of practice and the fact that she was licensed in two other

states and had passed an examination given by a voluntary organization. There was no dispute as to any of those facts. She was represented by an attorney, and had the opportunity to submit any written material she wished in support of her application. She relied on three letters from her attorney and evidence of her out of state licenses and the private examination (R-Exhibit A to app. to Cir. Ct., pp. 24-32). She did not request a hearing, no statute required one, and the decisions of this court in Board of Regents v. Roth, 408 U.S. 564 (1972) and the succeeding cases were all in the future. The administrative record upon which the petitioners' determination was made consisted entirely of the material submitted by respondent's attorney and her record on the licensing examinations. There were no hostile witnesses to be cross-examined, no conflicting evidence to be refuted. The situation is analogous to a court case which can be decided on the pleadings or on a motion for summary judgment. Judicial due process does not require a trial where there is no triable issue of fact, and the Courts below have erred in holding that administrative due process requires a hearing even where there is no contested issue of fact and an applicant, represented by an attorney, has not even requested one.

There is a clear distinction between cases in which the State or a private party moves to terminate a right to liberty or property which it has conferred and which the holder reasonably assumes to be a continuing right, and cases, such as this one, where the right is subject to the holder meeting and maintaining standards of eligibility. The former cases involve action of a disciplinary nature, and a due process hearing is required (Perry v. Sinderman, 408 U.S. 593 [1972]; Morrisey v. Brewer, 408 U.S. 471 [1972]; Goss v. Lopez, 419 U.S. 565, [1975]). The latter type of cases involve failure to qualify for a right or to meet the standards for its continued exercise, without any allegation of misconduct or any aura of discipline or opprobrium. In these cases no such due process hearing is required (Board of Regents v. Roth, supra; Mathews v. Eldridge,

424 U.S. 319, [1976]; Leis v. Flynt, supra; Spady v. Mount Vernon Housing Authority, 34 NY 2d 573, 310 N.E. 2d 542, cert. den. 419 U.S. 983 [1974]).

The issue of a hearing in cases of this nature is an important one to petitioners and to other licensing agencies. Affirmance of the holding of the Court below would seriously impair and unnecessarily prolong and complicate the State's exercise of its police power to protect citizens by insuring high standards of competence for professional licensees, and by using objective and fair licensing examinations to achieve that purpose.

The District Court did not regard its holding on this as a matter of general concern to the petitioners. The decision itself seeks to narrow the scope of the holding, by limiting it to "grandfather" applicants for licensure, and the Court notes that "there is no indication in the record that the burden to be borne by the State in providing some form of hearing to applicants such as respondent would be of insurmountable magnitude" (A-48). The complaint had not asked for a hearing, but for an order granting a license and restraining criminal prosecution. The answer met those issues, and the District Court properly denied those requests. No appeal or cross-appeal was filed by respondent. However, the declaration that a hearing should have been offered, while it gave no real sustenance to respondent, does raise a potentially serious problem and is indeed a matter of general concern to petitioners. We are now faced with a decision that any "grandfather" applicant who fails to meet the statutory requirements for the issuance of a license, and who then applies for a waiver of those requirements under New York State Education Law section 6506, must be given a hearing.

Such a rule would apply to hundreds of applicants who have previously been practicing professions for which licensure requirements are first imposed. The Legislature and the Governor have approved new pro-

fessional licensing statutes for several professions in recent years, including, for example, speech pathology, audiology, occupational therapy and animal health technology. The licensing statutes in these professions all became effective in 1976 and each provides a special means of qualification for "grandfather" applicants (see New York Education Law sections 8208, 7907 and 6611, subdivision 4). Another four professional groups, namely masseurs, certified social workers, physician's assistants and specialist's assistants, have also been made subject to licensing requirements in the present decade.

Every session of the New York State Legislature considers bills for the licensing of additional professional groups. Such bills routinely include special provisions for current practitioners. In addition, the Legislature has given serious consideration to the comprehensive revision of the provisions of New York Education Law Article 153, relating to the practice of psychology. The existing statutes do not limit the practice, but only the use of the professional title. Enactment of any one of several proposed revisions of this statute to limit the practice of psychology and/or of related types of counseling services would involve "grandfather" licensing provisions applicable to a large number of applicants. Consequently this aspect of the decision of the Courts below is a matter of serious import to the petitioners.

Common sense and due process considerations alike dictate the conclusion that no hearing was required on respondent's application for waiver of her examination failures.

POINT II

THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS INTERPRETED A NEW YORK STATE STATUTE (EDUCATION LAW SECTION 6506) IN A MANNER CONTRARY TO THE INTERPRETATION OF THE SAME STATUTE, ON THE SAME FACTS, BY THE HIGHEST COURT OF THE STATE OF NEW YORK, AND HAS VIOLATED ACCEPTED PRINCIPLES OF FEDERAL-STATE COMITY.

The lower Federal courts, as Judge LUMBARD noted in his dissent, have violated accepted principles of federal-state comity. They have failed to give proper weight to the interpretation of state statutes and procedural requirements in three respects. This point deals with the failure to properly take into account the interpretation of New York Education Law section 6506, subdivision 6 as uniformly applied by the State agency responsible for administering it and by the State Courts. The failure to apply state law relating to the defense of res judicata and the statute of limitations will be dealt with in Point III, post.

The details relating to the waiver application are fully stated in the statement of the case, at page 4 supra. The application was made September 21, 1971.

The waiver provision, present section 6506, subdivision 5 of the New York Education Law, provides that:

> "Section 6506. Supervision by the board of regents. The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:
>
> * * *
>
> (5) Waive education, experience and examination requirements for a professional licensee prescribed in the article relating to

> the profession, provided the board of regents shall be satisfied that the requirements of such article have been substantially met;

The former provision, replaced by section 6506 effective September 21, 1971, was set forth in section 211 of the New York Education Law as subdivision 2 and reads as follows:

> "2. The regents may by rule or order accept evidence of preliminary and professional education, and where practice is a prerequisite to licensure may receive evidence of such practice in whatever state or county the same may have been obtained or engaged in, for licensing a candidate to practice any such profession in lieu of that prescribed by the laws relating to such profession; provided it shall appear to the satisfaction of the regents that such candidate has substantially met the requirements of such laws."

At least since 1939 the New York appellate courts have recognized that these provisions should be applied sparingly, and are not intended to excuse individual applicants from specific licensing requirements which they cannot meet.

In Matter of Erlanger (256 App. Div. 447 [1939] aff'd sub nom.; Matter of Levi v. University of the State of New York, 281 NY 627) cited by the New York State Court of Appeals in its affirmance of the decision of the Appellate Division in favor of petitioners in this case, the Court said: "The Regents may not legally, through the exercise of the remedial power conferred by this section, admit to the profession those who have

not met the requirements the Legislature has established. If they err at all, it should be on the side of the protection of the public" (256 App. Div. at p. 447).

Respondent's effort to extend the purpose of the waiver statute to excuse her inability to pass the licensing examination was rejected by all eleven of the State appellate court judges. The Appellate Division noted that:

> "Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examination and barely failed."

The Court of Appeals unanimously affirmed that decision. Yet the Federal lower courts have totally ignored this interpretation of the key New York statute by petitioners and by the New York Courts, and have substituted their view of what New York law should be for what it actually is, as Judge LUMBARD noted in his dissent below.

The general provision authorizing the waiver of specific licensure provisions in exceptional circumstances serves an equitable purpose. It permits, for example, the licensure of applicants coming to New York who can establish that their education or experience is substantially equivalent to that specifically required by the New York licensing laws and regulations, although some subjects may be different or standards for supervised training may be somewhat different. Without the occasional leeway this statute provides, such applicants would be required to repeat professional education and experience. Section 6506, subdivision 5 provides for the waiver of insubstantial deviations from New York requirements, and subdivi-

sion 6 provides for the indorsement of out-of-state licenses, granted upon equivalent licensing standards. Neither is a means of excusing failure to meet the requirements.

The New York courts held, as a matter of law, that section 6506 did not confer discretion on appellants to waive the examination requirement for appellee. Respondent admits that the statute has not been applied to excuse examination failures, and that fact is proven in the record (Complaint, para. 15, at A-16; answer para. 14 at A-23; interrogatory, answer no. 23 at A-32). The Courts below erred in ignoring New York's clear and consistent interpretation of the purpose and scope of the waiver statute. In substituting their view of what New York law should be for the unanimous opinion of the two New York appellate courts as to what it actually is, the Courts below have in effect rewritten a New York statute and served as an appellate court over the New York Court of Appeals in the interpretation of a state statute. By so doing they have, as Judge LUMBARD said, violated "accepted principles of federal-state comity as well as common sense and judicial modesty" and, we add, the exclusive appellate jurisdiction of this Court under 28 U.S.C. section 1257 and the full faith and credit due state statutes and judicial proceedings under 28 U.S.C. section 1738.

POINT III

THE DEFENSES OF RES JUDICATA AND THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN SUSTAINED AND THIS ACTION SHOULD HAVE BEEN DISMISSED.

The Court of Appeals for the Second Circuit has adopted extremely limited interpretations of the applicability of the defenses of res judicata and of statutes of limitations in actions alleging civil rights violations under 42 U.S.C. §1983. In applying those interpretations

to the facts of this case the Second Circuit has in effect, constituted the Federal District and Circuit Courts as appellate courts for the review of a determination of the New York State Court of Appeals, in violation of 28 U.S.C. §1257, and it has failed to apply New York State procedural law, in violation of 28 U.S.C. §1738. The policies of the Second Circuit, as applied in this case, were not necessary for the purposes of the Federal Civil Rights Act, and have the undesireable effect of promoting and prolonging unnecessary litigation, adding to the docket problems of the Federal courts and depriving other litigants of prompt resolution of their claims. The interpretation of the Second Circuit in refusing to apply the defense of res judicata and the statute of limitations to civil rights actions is contrary to the interpretation placed upon these rules by other circuits. For all of these reasons this case presents a proper instance for the exercise by this Court of its supervisory responsibility over the lower Federal courts.

Before discussing the specific rules and their applicability to the peculiar facts of this case, it should be emphasized that it is petitioners' position that these defenses should be considered on the basis of the issues raised by the pleadings before the District Court, and not simply on the basis of the eventual holding of that Court and of the majority of the Second Circuit (i.e. on the action as presented, not as decided). This was an action to compel the Board of Regents to license Mary Tomanio as a chiropractor, and to restrain a criminal prosecution of her for practicing without a license pending the final resolution of the case. Licensure and injunctive relief was the real relief she requested in her complaint. That was the same relief requested by her in her prior State court proceeding. The case sought to be made by respondent was based upon the claim that the Board of Regents had never applied a State statute authorizing the waiver of licensure requirements, and that its failure to do so, and to establish "fair review procedures" for the application of the waiver statute had deprived her of due process of law. The Courts

below denied respondent all of the substantive relief she requested, and gave her instead the empty (for her personally) victory of declaratory relief that she should have been offered a hearing. The defenses of res judicata and the statute of limitations should have been applied, however, since the basic cause of action was the same as in the prior State court proceedings and since all of the issues raised in this action were or could have been raised in the State court proceeding.

A. RES JUDICATA

The defense of res judicata, in New York State, is a bar to any issue which was or could have been raised in a prior case between the same parties (Winters v. Lavine, 574 F 2d 46, 55-56; and cases cited therein [2nd Cir. 1978]). Under the mandate of 28 U.S.C. §1257, the same rule should be applied by the Federal courts to New York cases. However, in cases sought to be brought under 42 U.S.C. §1983, the Second Circuit has restricted the defense to issues actually raised in the prior case, and has postulated a "general federal law of res judicata" (Winters v. Lavine, supra at p. 56; Lombard v. Board of Education, 502 F 2d 631 (2d Cir. 1974); cert. den. 420 U.S. 976).

The extent to which the defense of res judicata should be applied to Federal civil rights cases following state court proceedings is a question as yet unanswered by this Court, and answered in various and contradictory ways by the lower Federal courts. The confusion and uncertainty has been sufficient to prompt several excellent articles in the legal periodicals (See, e.g. Res Judicata: The Neglected Defense, by David B. Currie, The University of Chicago Law Review, Vol. 45 p. 317-50; Developments in the Law, section 1983 and Federalism, Harvard Law Review, Vol. 90 pp. 1330-54; Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, by William H. Thies, Northwestern University Law Review, Vol. 70, pp. 859-81). In Winters v. Lavine, the Second Circuit itself discussed at great

length the problem and the many conflicting cases. We will not repeat at length analyses and citations from that case or from those law review articles, except as necessary to show that principles of sound judicial administration and of comity require the reversal or modification of the rule in Second Circuit, as applied in this case.

In Winters, the Second Circuit recognized that the doctrine of res judicata, in its twin parts of "case preclusion" and "issue preclusion" (or collateral estoppel) were applicable to civil rights actions. In Winters, a constitutional argument was made in the lower state courts, although the case was decided on other grounds and without mention of the constitutional argument in the decision of the Appellate Division, and although the New York Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question (was) directly involved." Nevertheless the Second Circuit found that Winters claim was barred by the doctrine of collateral estoppel because the issue had been raised and its determination was necessary to the final state court decision. The Court expressly declined to decide whether or not Winters claim would also have been barred under the case preclusion aspect of the defense of res judicata, noting that by so doing the Court avoided the conflict between the New York State rule of case preclusion, which applied to all issues which were or which could have been raised in the prior case, and the "general Federal rule", under which the Second Circuit had limited the defense to issues actually raised. That issue, skirted by the Second Circuit in Winters v. Lavine, and alluded to by this Court in its decision in Huffman v. Pursue Ltd. (420 U.S. 592 [1975]), in which the defense of res judicata appeared appropriate but had not been pleaded, is squarely presented by this case.

The reasons given for the limitation of the application of this defense in civil rights cases are summarized by the Second Circuit itself in Winters, and in the three law review articles previously cited. They

are the fear that the state courts cannot be trusted to fairly and competently enforce the Federal Civil Rights Statutes, the interpretation of that statute as intended to give litigants the right to reserve Federal civil rights questions for the Federal Courts, and the recognition that a litigant involuntarily involved in a state court proceeding would be deprived of the right to reserve the Federal questions for the Federal courts if the traditional concept of res judicata was applied. None of these considerations is relevant to the facts of this case.

There is simply no justification for any assumption that the New York courts could not fairly have adjudicated any alleged violations of §1983 (Huffman v. Pursue, 420 U.S. at 611). The facts were fully established and uncontested in both the State and the Federal courts, and respondent has never contended that she was deprived of an opportunity to submit any evidence in support of her application, or that she has, even now, anything to submit or to say that was not submitted and said at the time of her application in 1971. Consequently, this is not a case in which the application of the defense of case preclusion would deprive a litigant of the opportunity of a trial in Federal Court or elsewhere of factual issues relevant to a claim of denial of civil rights.

Furthermore, this is a civil, not a criminal matter (Parker v. McKeithen, 488 F 2d 553 (5th Cir. 1974), cert. den. 419 U.S. 838). Petitioner was represented by an attorney from the very inception of the administrative proceeding which led to these nine years of litigation. Her own informed voluntary choice of forum, and not any state action or the application of the rule of Younger v. Harris (401 U.S. 37 [1971]), put her in the state courts, and the exception to the defense of res judicata is not necessary to protect her from the involuntary loss of a Federal forum for her civil rights contentions (Parker v. McKeithen, supra; Scoggin v. Schrunk, 522 F 2d 436 [9th Cir. 1975]; cf. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 [1974]).

There is no justification in the civil rights statute itself, or in the decisions of this Court for the failure to apply the defense of res judicata as required by state law and by 28 U.S.C. section 1738 (Preiser v. Rodriguez, 411 U.S. 475 [1973]). The extensive analysis of the cases by the Second Circuit in Winters v. Lavine, supra clearly shows that the Second Circuit has strong doubts about its own rule and recognizes that it is inconsistent with section 1738. Other circuits have applied state defenses of res judicata to issues which could have been but were not raised in prior state proceedings (Roy v. Jones, 484 F 2d 96 [3rd Cir. 1973]; Davis v. Towe, 526 F 2d 588 [4th Cir. 1975], aff'd 379 F. Supp. 536 [E.D. Va. 1974]; Brown v. Chastain, 416 F 2d 1012 [5th Cir. 1969]; Coogan v. Cincinnati Bar Association, 431 2d 1209 [6th Cir. 1970]; Blankner v. Chicago, 504 F 2d 1037 [7th Cir. 1974]; Francisco Enterprises, Inc. v. Kirby, 482 F 2d 481 [9th Cir. 1973]; Flynn v. St. Board of Chiropractic Examiners, 418 F 2d 668 [9th Cir. 1969]; Frangier v. East Baton Rouge Parish School Board, 363 F 2d 861 [5th Cir. 1966]). This Court should resolve the issue, and apply the New York law of res judicata to this case.

The declaratory judgment granted by the Second Circuit in this case clearly undermined the prior judgment of the State courts, and by accepting this case, the lower Federal courts really constituted themselves as appellate courts over the State courts, a clear violation of 28 U.S.C. 1257, which confers exclusive appellate jurisdiction in such cases on this Court, and a collateral attack on the State court judgment (Huffman v. Pursue Ltd., 420 U.S. at p. 609; Rooker v. Fidelity Trust Co., 263 U.S. 413 [1923]; Roy v. Jones, supra; Brown v. Chastain, supra; Coogan v. Cincinnati Bar Association, supra; Blankner v. City of Chicago, supra).

Although the reasons for the exception to the normal application of res judicata are absent in this case, the reasons for the defense of res judicata are present.

As a matter of public policy and sound judicial administration there must be an end to litigation. This case has been in the courts for approximately nine

years and has reached all three levels of State courts followed by all three levels of Federal courts. To permit her to raise the question of a hearing for the first time five years after the determination and seven months after the final judgment of the highest State court, and to then argue that the failure to give her a hearing she never asked for was a violation of her civil rights and can only be rectified by giving her a license is to permit a flagrant misuse of the judicial process. This rule of the Second Circuit permitting successive suits in State and Federal courts in civil rights actions obviously promotes unnecessary litigation by encouraging litigants to bring successive suits.

For all of the foregoing reasons, this Court should overrule the special Second Circuit rule of Lombard v. Board of Education, supra and apply the New York principle of res judicata to this case. Under that rule, the defense of res judicata should be sustained, since the parties and cause of action were the same, respondent was represented by an attorney and voluntarily brought her case in State court, and none of the special reasons given for not applying the normal rule are present in this case.

The "cause of action" was the same, notwithstanding the fact that section 1983 was not specifically mentioned in the State courts, under the meaning of the terms "cause of action" or "claim and demand" as they have been construed in connection with the defense of res judicata by the New York courts and in the Revised Restatement of Judgments. As Professor Hyatt states the rule, in his recent thorough analysis of the problem in The University of Chicago Law Review (Vol. 45, at p. 340):

> "Accordingly, under the revised Restatement of Judgments a single 'claim' (cause of action) for res judicata purposes 'includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.' "

In this case and in the State court proceedings all of respondent's claims arose out of one transaction - the denial of her application for waiver of the examination requirement. The mere addition of an additional theory under section 1983 does not constitute a new cause of action (Scoggin v. Schrunk, 522 F 2d 436 [9th Cir. 1975]). And under New York law, as summarized in Winters v. Lavine (574 F 2d at p. 56):

> "The New York courts appear to recognize that the two lawsuits are based on the 'same cause of action' if a 'different judgment in the [later action] would destroy or impair rights or interests established by the [earlier action].' Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., supra, 250 N.Y. at 307, 165 N.E. at 457; accord, e.g. Erbe v. Lincoln Rochester Trust Co., supra, 3 N.Y. 2d at 327, 165 N.Y.S. 2d at 112, 144 N.E. 2d at 81."

The State court judgment in the instant case had established that respondent was not entitled to a license without examination and that petitioners had no further obligation in that respect. This judgment was clearly destroyed and the entire matter reopened by the judgment of the District Court.

The complaint should have been dismissed under the case preclusion aspect of the defense of res judicata.

The issue preclusion aspect of res judicata is also a defense in this action to the issues litigated in the State court action. These include the determination that New York Education Law, section 6506 did not authorize the licensure of respondent on the facts in this record, and that her New York examination results,

together with her past practice, her licensure in Maine and New Hampshire, and her passing the private licensing examination, were not the substantial equivalent of the New York requirements.

B. STATUTE OF LIMITATIONS

Under New York law a proceeding to review a determination of a state agency must be commenced within four months (New York Civil Practice Law and Rules section 217). The Second Circuit, however, applies a three year statute of limitations, borrowed from New York Civil Practice Law and Rules section 214, to cases under section 1983. Under either statute, this action was not timely. It was not commenced until June 25, 1976, over four years after the determination made November 22, 1971, and over seven months after the final judgment in the State courts.

The Court below erred in rejecting this defense and in finding and applying an inherent power to toll the running of the period of limitations during the pendency of plaintiff's State court proceedings. The District Court was in obvious doubt about its authority in this respect, and relied for authority on Mizell v. North Broward Hospital District (427 F 2d 468 [5th Cir. 1970]). The Circuit Court cited Williams v. Walsh (558 F 2d 667 [2nd Cir. 1977]); and Ornstein v. Regan (574 F 2d 115 [2nd Cir. 1978]) as authority for tolling the statute of limitations.

We argue that the authority posited by the Fifth Circuit in Mizell does not exist, and even if it did exist it would be an abuse of discretion to apply it in this case. Our argument is very cogently made for us by the First Circuit in the very recent case of Ramirez de Arellano v. Alvarez de Choudens (575 F 2d 315 [1st Cir. 1978]). That Court stated the rule to be that "prior actions in the state courts do not toll the applicable statute of limitations" citing Williams v. Walsh, supra; and Meyer v. Frank (550 F 2d 726 [1977]) from the Second Circuit; and Ammlung v. City of Chester (494 F

2d 811 [3d Cir. 1974]). The Court disposed of Mizell in the following apt footnote (at p. 320):

> "4. One federal court, although conceding that state law did not provide a rule allowing related actions to toll a §1983 suit, has suggested that federal policies underlying §1983 might require the fashioning of a federal tolling rule to that effect. See Mizell v. North Broward Hospital Dist., 427 F 2d 468 (5th Cir. 1970). Subsequent decisions of that circuit have refused to follow Mizell's dicta. see Blair v. Page Aircraft Maintenance, Inc., 467 F 2d 815 (5th Cir. 1972), and the reasoning underlying those remarks was rejected by the Supreme Court in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). Every court of appeals that has since considered the issue has refused to follow Mizell, Meyer v. Frank, supra at 729; Ammlung v. City of Chester, supra at 816."

There is neither Federal nor State statutory authority for the tolling of the statute of limitations in this case. Mizell has been on the books for over eight years. It has not been followed by other Circuit Courts and has perhaps even been abandoned in the Fifth Circuit, as the above quotation suggests. Congress has seen no need to enact a Federal tolling provision.

Three years is not an unreasonably short time. Respondent was represented by an attorney, and must be presumed to have known her legal rights and options. The Second Circuit has reserved the authority to toll a statute of limitations where the application of the

statute "would frustrate the policy underlying the federal cause of action asserted." It has recognized that the decision whether or not to toll involves a balancing of "the protection of the substantial federal policy under consideration on the one hand and protection of the policy behind the statute of limitations on the other hand. The respondent's conduct - particularly his diligence in pressing his claim - also is taken into account" (Meyer v. Frank, supra at p. 729).

It is hard to see any substantial Federal policy which would be subverted by applying the three year statute in this case. The District Court denied respondent all of the relief she asked for, merely finding that she should have been offered a hearing. Assuming for the purpose of considering the statute of limitations argument that these findings are correct, they do not amount to the implementation of a substantial federal policy sufficient to override the harm to petitioners, and the public policy served by statutes of limitations. Respondent's course of action in defining the issues in the Article 78 proceeding lulled petitioners into a justifiable sense of repose. To toll the statute of limitations in this case would encourage litigants, especially those whose interests would be served by delay, to try cases piecemeal and by successive actions in State and Federal courts. The result would be to delay eventual justice and to subject the courts and defendants to two lawsuits where one would suffice. Finally, the full faith and credit mandate of 28 U.S.C. §1738, discussed above, is also applicable here and should have led to the application of the New York statute of limitations.

Conclusion

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED, AND THE COMPLAINT DISMISSED.

Dated: December 13, 1979

Respectfully submitted,

ROBERT D. STONE
Attorney for Petitioners
Office and P.O. Address
State Education Building
Albany, New York 12234
(518) 474-6400

Jean M. Coon,
Deputy Counsel
Donald O. Meserve,
Associate Attorney,
Of Counsel

UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. CODE 1738

Section 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c.646, 62 Stat. 947.

42 U.S. Code Section 1983

FEDERAL CIVIL RIGHTS STATUTE

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATUTES INVOLVED
IN THIS CASE

APPENDIX

FORMER EDUCATION LAW PROVISIONS PROVIDING SPECIAL EXAMINATIONS FOR "GRANDFATHER" CHIROPRACTORS.

Section 6556. Present practitioners

1. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who:

a. is twenty-one years of age or over;

b. is a citizen of the United States or who has duly declared his intention of becoming a citizen in accordance with law;

c. is a graduate of a resident course in chiropractic, consisting of not less than two school years of formal study;

d. is of good moral character;

e. is a resident of this state and has been a resident for at least one year prior to July first, nineteen hundred sixty-three;

f. has engaged for the period of at least the fifteen years immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state; and

g. passes an examination prepared by the board in the practice of chiropractic and an examination in the use and effect of X-ray.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

* * * *

3. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who at the time meets the requirements set forth in paragraphs a, b, c, d and e of subdivision one of this section and who:

a. has been engaged for the period of at least the two years, and not more than the seven years, immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state;

b. passes an examination prepared by the department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; and

c. in addition to such written examination, passes a written examination prepared by the board in the use and effects of X-ray and a practical examination prepared by the board in chiropractic.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use

X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

NEW YORK EDUCATION LAW SECTION 6551 SUBDIVISION 1 DEFINING CHIROPRACTIC

Section 6551, subdivision 1:

The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortions, misalignment or subluxation of or in the vertebral column.

NEW YORK EDUCATION LAW SECTION 6506
AUTHORIZING THE BOARD OF REGENTS TO
WAIVE SPECIFIC LICENSING REQUIREMENTS
IN ANY PROFESSION OR TO INDORSE LICENSES
OF OTHER JURISDICTIONS

Section 6506. Supervision by the board of regents

The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:

* * * *

(5) Waive education, experience and examination requirements for a professional licensee prescribed in the article relating to the profession, provided the board of regents shall be satisfied that the requirements of such article have been substantially met;

(6) Indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the following requirements:

(a) Application: file an application with the department;

(b) Education: meet educational requirements in accordance with the commissioner's regulations;

(c) Experience: have experience satisfactory to the board in accordance with the commissioner's regulations;

(d) Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;

(e) Age: be at least twenty-one years of age;

(f) Citizenship: be a United States citizen, or file a declaration of intention to become a citizen, unless such requirement is waived, in accordance with the commissioner's regulations;

(g) Character: be of good moral character as determined by the department; and

(h) Fees: pay a fee to the department for indorsement of forty dollars.

FORMER NEW YORK STATUTORY PROVISIONS
REPLACED EFFECTIVE SEPTEMBER 1, 1971
BY SECTION 6506, SET FORTH ABOVE

Section 211. Supervision of professions

* * * *

2. The regents may by rule or order accept evidence of preliminary and professional education, and where practice

is a prerequisite to licensure may receive evidence of such practice in whatever state or country the same may have been obtained or engaged in, for licensing a candidate to practice any such profession in lieu of that prescribed by the laws relating to such profession; provided it shall appear to the satisfaction of the regents that such candidate has substantially met the requirements of such laws.

3. And the regents shall have further power to indorse a license issued by a legally constituted board of examiners in any other state or country upon satisfactory evidence that the applicant has met any requirements in force in this state as to citizenship and residence and has completed, as of the date of such application, education and training which is substantially the equivalent of the requirements in force in this state when such license was issued, and that the applicant has been in the lawful and reputable practice of his profession for a period of not less than five years prior to his making application for such indorsement, or in the event that a lesser period of practice, or no practice, is required for indorsement of a license to practice such profession by the provisions of this chapter relating to the practice of the particular profession, such license may be indorsed upon submission of satisfactory evidence that the applicant has met the requirement of such other provision as to practice. When the evidence presented is not satisfyingly sufficient

to warrant the indorsement of such license, the board of regents may require that the candidate for indorsement shall pass such subjects of the licensing examination specified by statute or regents rule as should be required of the candidate to establish his worthiness to receive such indorsement.

* * * *

Section 6553. Licenses

* * * *

2. The department may also, without the examination herein provided, license the holder of a duly issued and valid license to practice chiropractic granted by any other state or country after examination passed subsequent to the effective date of this act, upon payment of the fee herein provided, provided (a) that such examination was substantially equivalent in content, character and quality to the examinations given in this state at the time the applicant obtained such license from such other state or country, (b) that the preliminary and professional education of the applicant shall have been not less than that required pursuant to section sixty-five hundred fifty-one of this article, at the time of his application, and (c) that he shall have been in practice continuously for not less than five years immediately next preceding his application.

* * * *